HARVARD

LAW REVIEW.

VOL. IV. OCTOBER 15, 1890. NO. 3.

A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

VI.

CREDITORS' BILLS.

IT was stated in a former article[2] that there are three important classes of bills in equity which are founded upon contracts or obligations, and yet are not called bills for specific performance; namely, bills for an account, bills of equitable assumpsit, and creditors' bills. The first and second of these have already been treated of, and it is now proposed to treat of the third.

A creditor's bill is a bill filed by a creditor of a deceased debtor against the personal or the real representative, or against the personal *and* the real representatives, of the latter, to compel payment of the debt.[3] The jurisdiction of equity over such bills depends entirely upon the single fact of the debtor's death; for against a living debtor, as such, equity never has jurisdiction, while against the representatives of a deceased debtor equity always has jurisdiction (*i.e.*, in England). What is there then in

[1] Continued from Vol. 3, p. 262.

[2] Vol. 2, p. 242.

[3] It is scarcely necessary to remind the intelligent reader that, in some (perhaps many) of our States, the term "creditor's bill" is commonly applied to a very different kind of bill from that which is the subject of the present article; namely, a bill filed by a judgment creditor, whose execution, issued upon the judgment, has been returned unsatisfied, in whole or in part, to obtain satisfaction of the judgment out of assets of the judgment debtor which cannot be taken upon execution. It will be found convenient to distinguish these two classes of bills from each other, by calling the latter "judgment creditors' bills."

the mere fact of a debtor's death to give to his creditors a right to call upon equity to assist them in enforcing payment of their debts? In order to answer this question satisfactorily it will be necessary to ascertain what obstacles a creditor is liable to encounter, as a consequence of his debtor's death, in attempting to enforce payment of his debt by an action at law.

During the life of a debtor, the only remedy of which his creditor as such can avail himself is against the person of the debtor. It is true that, at the present day, a debtor's property generally constitutes the only means by which his creditor can enforce payment of his debt; but it is only by means of process against a debtor's person that his property can be reached. In short, the creditor must obtain a judgment for his debt against the debtor personally before he can compel payment of the debt out of his debtor's property. When, therefore, the debtor dies, the creditor's remedy is gone. The debtor's property, to be sure, remains, but the creditor cannot touch it unless the law furnishes him with some new remedy. Indeed, when a debtor dies, his debts would all die with him did not positive law interpose to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is impossible that an obligation should continue to exist after the obligor has ceased to exist. Whenever, therefore, a debtor dies, positive law has to interpose, first, to keep his debts alive; and, secondly, to provide his creditors with a new remedy against his property. What is the nature of the remedy which positive law thus provides? If the question were a modern one, or if it were governed by modern ideas, we might expect a remedy to be provided which would be analogous to that which is provided against a bankrupt debtor or against an insolvent corporation. In other words, we might suppose that, in case the debts owing by a deceased debtor were not promptly paid, some court would be authorized, on the application of his creditors, to take his property into its own hands, and apply it to the payment of his debts, giving the surplus, if any, to the persons entitled to receive it. The question, however, is not a modern one, nor is it governed by modern ideas. On the contrary, it is as old as the law itself, and the law relating to it is so bound up with the habits and customs of the people as not easily to admit of change. Accordingly, we shall find that the remedy provided by law for the creditors of deceased debtors is for the most part very

ancient; that, while it has been subject to changes, the changes in it have been very slow and gradual; and that it is almost a total stranger to modern ideas, with the exception of such as have been infused into it by equity.

By the Roman law, every human being who had rights (other than such as were merely personal), or was subject to obligations or duties (other than such as were merely personal), had two personalities (*personas*), one natural, the other legal, artificial, and fictitious; and it was in the latter that his rights were vested, and upon the latter that his obligations and duties were imposed. It was a peculiarity of the legal personality that, being the creature of law, it continued to exist so long as there was any reason for its existence. It was not affected, therefore, by the death of the natural person, but continued its existence in the natural person's successor or heir (*hæres*).[1] It followed, therefore, that every natural person who had rights, or was subject to obligations or duties, at the time of his death, necessarily had a successor or heir, who possessed all his rights and was subject to all his obligations and duties. Moreover, every person's successor or heir was either such person as he himself appointed by his will (*hæres factus*), or, if he made no appointment, such person as was designated by law (*hæres natus*). An heir designated by law became such for his own benefit alone. An heir appointed by will was required to pay such legacies as were given by the will, subject to which he also took the inheritance for his own benefit. In respect to the obligations and duties to which the deceased was subject at the time of his death, there was no difference between the *hæres factus* and the *hæres natus;* for such obligations and duties fell, necessarily and by operation of law, upon the one and the other, without distinction. So completely, indeed, was the heir of the deceased person identified with the deceased, that the law made no distinction between the estate of the one and that of the other, nor between the debts of the one and those of the other. If, therefore, an insolvent heir succeeded to a solvent inheritance, the creditors of the heir had as much right to be paid their debts out of that inheritance as the creditors of the deceased had; and if a solvent heir succeeded to an insolvent inheritance, the creditors of the deceased had as much right to be paid out of the heir's own estate as his own creditors had; and the only way of avoiding this last consequence of becoming a

[1] See Maine, Ancient Law (4th ed.), 181–8.

deceased person's successor was by refusing to accept the succession.[1] It will be seen, therefore, that the remedy of a creditor of a deceased debtor was very simple under the Roman law, *i.e.*, he sued the heir of the deceased, just as he would have sued the deceased during his life, and with the same consequences; and this state of things continued without material change throughout the whole period of the Roman law, *i.e.*, down to the time of Justinian. Justinian introduced one important change, and only one, namely, that of allowing the heir the benefit of inventory (*beneficium inventarii*); for he declared that such heirs as chose to prepare and file, within the time and in the manner directed by him, an inventory of the estate of the deceased should be liable to the creditors of the latter only to the extent of such estate.[2] From this time, therefore, an heir was liable under the old law or the new, according as he did or did not comply with the new law. If he did, he incurred a liability only to account for the estate of the deceased; if he did not, he remained personally liable for all the debts of the deceased as before. If an heir availed himself of the new law, of course he became bound to keep the estate of the deceased separate from his own estate.

After the Roman empire became Christian, the Church by slow degrees obtained control of the administration of the estates of all deceased persons. This result it finally accomplished by obtaining for its bishops the right to administer the estates of all deceased persons within their respective dioceses. In this way it came to be the law, throughout Western Christendom at least, that the heir of every deceased person was the Ordinary, *i.e.*, the bishop of the diocese. This, however, did not mean that the estates of deceased persons were administered by the bishop personally, — it only meant that they were administered by persons appointed by him, who derived their authority from him, and who were accountable to him. Nor did this right of the bishop practically interfere with the immemorial right of every person to appoint his own heir by will. On the contrary, this latter right continued to be exercised as before, the only difference being that an heir appointed by will must now obtain the bishop's sanction before he could act, — a sanction, however, which was seldom withheld.[3] It thus came

[1] Justinian, Inst., L. 2, Tit. 19, § 5; Gaius, L. 2, §§ 162, *et seqq.*

[2] Inst., L. 2, Tit. 19, § 6; Code, L. 6, Tit. 30, § 22.

[3] By the law of England the bishop was bound to give his sanction, and, if he refused to do so, a *mandamus* would issue. 1 Williams, Executors (1st ed.), 214.

about that the estate of every deceased person had to be administered by a person appointed by the bishop of the diocese. If the person so appointed was nominated in the will of the deceased, he came to be known as the executor of the will (*executor testamenti*); if the appointment was made without any such nomination, he was known as the administrator of the estate of the deceased. Practically, therefore, the modern executor is the *hæres factus*, as the modern administrator is the *hæres natus*, of the Roman law. In strictness, however, as already stated, the original right of administration is in the bishop; and this appears clearly from the fact that his appointments of executors and administrators always take effect as grants.[1]

The transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities indirectly brought about two material changes: first, heirship ceased to be a private right, and became an office, in the performance of which the heir as such had no personal interest; secondly, when heirship had ceased to confer any pecuniary benefit upon the heir, the absurdity of holding the latter personally liable for the debts of the deceased became manifest; and hence the doctrine that an heir was so liable became entirely obsolete, while the exhibiting of an inventory ceased to be a privilege, and became a duty.

Two further remarks are called for respecting the transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities, namely, first, that in England it extended only to personal or movable property, feudalism having secured complete dominion over land; secondly, that it did not extend to the payment of debts, as to which executors and administrators have always been amenable to the secular authorities.

We are now prepared to inquire what remedy was furnished by the law of England to a creditor of a deceased debtor against the personal property of the latter, at the time when equity first assumed jurisdiction over creditors' bills. First, the remedy was an action by the creditor against the executor[2] of the deceased, as by the Roman law it was an action against the heir. Secondly, the executor was bound to pay the debts of the deceased out of his personal property, *i.e.*, so far as such property would enable him

[1] See Idem, pp. 212–13, 268–9. See also a learned and instructive article by Mr. Henry C. Coote, 1 Law Mag. and Law Rev. 252–267.

[2] As there will be no occasion hereafter to distinguish between executors and administrators, the term "executor" will alone be used.

to do so, but no further. He was not, therefore, regarded as personally owing the debt, and, though an action of debt lay against him, he was liable only in the *detinet*, — not in the *debet et detinet*. Thirdly, the executor still retained so much of the character of his prototype, the Roman heir, that the law always assumed that the assets in his hands were sufficient for the payment of debts, until the contrary appeared; and hence the creditor never had the burden of alleging and proving that the executor had sufficient assets to pay his debt.[1] Fourthly, if the executor had not sufficient assets to pay the plaintiff's debt, he had to set up that fact as an affirmative defence and prove it. If he failed to set it up, or failed to prove it, and the plaintiff recovered in consequence, the verdict and judgment, or (if the judgment was by default or on demurrer) the judgment alone, established conclusively that the executor had sufficient assets, it being a universal principle that a defendant who fails to set up or to prove an affirmative defence at the proper time, loses the benefit of it, the law acting on the supposition that he has no such defence, and not permitting him to say to the contrary.[2] Therefore, fifthly, the question whether the executor had assets to pay the plaintiff's debt was always settled conclusively at the trial. If it appeared that he had not, there was a verdict and judgment in his favor, and the plaintiff paid costs. If it did not so appear, there was (in the absence of any other objection to the plaintiff's recovering) a verdict and judgment for the plaintiff, in which event the executor had to pay the judgment, even though he paid it out of his own pocket. Still, sixthly, the judgment, in accordance with the legal theory of the executor's liability, was only that the plaintiff recover the amount out of the assets of the testator in the executor's hands, or, in technical language, the judgment was *de bonis testatoris*, — not *de bonis propriis*. In short, while the judgment established the liability of the executor conclusively, it did so, not by making the debt of the testator his debt, but by proving conclusively that he had assets of the testator sufficient to pay it. Seventhly, when an execution was issued on a judgment against an executor, a failure by the latter to show to the sheriff goods of the testator out of which the amount of the judgment could be made, proved that the executor had wasted or con-

[1] William Banes's Case, 9 Rep. 93 *b*.

[2] Rock *v.* Leighton, 1 Salk. 310, Comyns, 87, 1 Ld. Raym. 589, 3 T. R. 690; Ramsden *v.* Jackson, 1 Atk. 292; Erving *v.* Peters, 3 T. R. 685; Leonard *v.* Simpson, 2 Bing. N. C. 176; Palmer *v.* Waller, 1 M. & W. 689.

verted to his own use a sufficient amount of the testator's assets to pay the judgment; *i.e.*, that the executor had committed that species of tort known as a *devastavit*. Eighthly, when an executor had committed a *devastavit* he was required to pay the testator's debts, to the extent of such *devastavit*, out of his own pocket. This liability could be enforced by a creditor who had already recovered a judgment *de bonis testatoris*, in either of two ways; namely, by bringing a new action against the executor personally for the tort, in which action, of course, the judgment was *de bonis propriis*, or by issuing a *scire facias* on the judgment already recovered, calling upon the executor to show cause why the plaintiff should not have execution against the executor's own goods.[1]

The next question is, whether any sufficient reason can be found, in the matters stated in the preceding paragraph, for permitting a creditor of a deceased debtor to file a bill in equity against the executor of the latter, instead of suing him in an action at law. Before considering that question, however, it may be well to point out briefly the nature of the relief which equity gives upon a creditor's bill, in order that the reader may compare such relief with the remedy given by the common law, as stated in the preceding paragraph. Equity takes its stand in effect upon the Constitution of Justinian, by giving the executor his choice between accounting for the testator's personal estate, on the one hand, and paying the testator's debts out of his own pocket, on the other hand. Justinian's Constitution said to the Roman heir that he might avoid personal liability for the debts of the deceased by accounting for the estate of the latter, *i.e.*, by preparing and filing an inventory, which, of course, must be followed up, if necessary, by a full accounting. Equity says to the modern executor against whom a creditor's bill is filed, that he may, so far as the plaintiff is concerned, avoid the burden of accounting for the testator's estate by admitting in court sufficient assets to pay the plaintiff's debt, and thus making himself personally liable for such debt. And equity requires the executor to make his choice at the earliest practicable moment, namely, in his answer to the bill. If the executor admits assets in his answer, all that the plaintiff has to do at the hearing is to prove his debt, whereupon a decree will be made that the executor pay the debt thus proved, and this decree will be enforced by the usual process of

[1] See Wheatley *v.* Lane, 1 Wms. Saund. 216*a*, with Serjeant Williams's notes.

contempt. If the executor decline to admit assets in his answer, the only difference at the hearing will be that instead of a decree for immediate payment, a decree will be made that the executor render an account of the testator's estate before a Master. When this has been done, and the Master has made his report to the court, and the report stands confirmed, the cause is brought on for a further hearing, and a decree is made that the executor pay to the plaintiff the amount which has been found due to him, if the assets found to be in the executor's hands are sufficient for that purpose, — if not, then to the extent of such assets.

It would be difficult to devise a course of proceeding more perfectly adapted to the exigencies of the case, more simple, more direct, or more conformable to justice, than the foregoing; and there can be no doubt that, in all these particulars, it possesses a great advantage over the corresponding course of proceeding at common law. Still, the mere fact that the remedy furnished by the common law was not as good as it might be, while it might be a sufficient reason for demanding a better one, either from the courts themselves or from the Legislature, was scarcely sufficient to justify equity in assuming jurisdiction over a purely legal right. We must, therefore, go further, and inquire whether the case is one for which the common law cannot furnish an adequate remedy; and, in doing this, we may as well go at once to the point of chief difficulty, namely, the defence of want of assets. How shall a court of common law deal with this defence? How shall it find out whether an executor has sufficient assets or not? Clearly there is but one way of doing this properly, namely, by requiring an account from the executor of the estate of his testator. Can a court of law require such an account? A court of law can, indeed, take an account after a fashion, for it formerly did do it in the action of account; but then there was special machinery provided in that action for taking an account, and the account was not taken before a jury. The action of account, however, would not lie for the recovery of a debt, nor any other action except debt or *indebitatus assumpsit.* Only debt and *indebitatus assumpsit* would lie, therefore, against an executor for the recovery of a debt due from his testator. But in neither of these actions was there any machinery for taking an account. In each of them there was but one trial, namely, by a jury. The judgment, moreover, was the next step in the action

after the trial; *i.e.*, the trial ended in a verdict, and upon the verdict judgment was rendered. If any account was to be taken, therefore, in either of these actions, it must be taken at the trial; and yet it was never claimed that an account could be taken by or before a jury.

But the difficulty was not confined to the tribunal by or before which the account must be taken. It was more fundamental. An account is rendered in discharge of an obligation to account. It is rendered, not for the benefit of the party rendering it, but for the benefit of the party to whom it is rendered, the latter having acquired a right to have it rendered. It may, of course, be rendered voluntarily, just as any obligation may be voluntarily performed; or it may be rendered by compulsion, *i.e.*, by the compulsion of an action or suit. When rendered by compulsion, it is rendered pursuant to the judgment or decree of a court. This judgment or decree may be the result of a trial, or it may be pronounced upon the defendant's admissions, according as the defendant denies or admits his obligation to account; but in either case the accounting is the primary object for which the suit is brought (the ultimate object being the payment of whatever the plaintiff shall be entitled to receive as the result of the accounting), and in either case, therefore, the accounting is by way of relief.

When, however, an executor sets up a want of assets in an action of debt or *indebitatus assumpsit* brought against him by a creditor of his testator, he does so, as we have seen, by way of affirmative defence, and the setting up of an affirmative defence is a very different thing from rendering an account. An affirmative defence is always set up voluntarily, and for the defendant's own benefit. Instead of coming after a judgment or decree, it comes before the trial, and the setting of it up is a step leading up to the trial. Instead of being an object of the plaintiff's action, it is one of the means by which the defendant resists the action, — instead of being the relief for which the action was brought, it is a means of preventing the plaintiff from obtaining any relief. Moreover, an affirmative defence always consists of facts, of which truth or untruth may be predicated; and when such a defence is set up in an action at law, as the truth of the plaintiff's declaration stands admitted, the trial turns entirely upon the truth or untruth, the validity or invalidity, of the defence. If the defence turn out to be

true and valid, the action will be wholly defeated; if it turn out to be untrue or invalid, it will go for nothing, and the plaintiff, unless his declaration be bad in law, will recover his entire demand. An affirmative defence, therefore, can never succeed in part and fail in part; unless it is wholly successful, it must wholly fail, and hence, if such a defence consist of several facts, every one of those facts must be true, or the entire defence will fail. It follows, therefore, that an affirmative defence must be so framed that the plaintiff can traverse it, and must consist of such matter that, if the plaintiff does traverse it, or any fact of which it consists, an issue may be joined, upon the decision of which the entire action will depend.

The question now under consideration, namely, whether an executor has in his hands sufficient assets to pay a creditor of his testator, will serve to illustrate some of the differences between an accounting and a defence. The object of an accounting by an executor, at the suit of a creditor of his testator, is to ascertain *how much* assets the executor has in his hands; and it is always the creditor who wishes to accomplish this object, and in order to accomplish it he must bring the proper action, or must properly frame his action. Moreover, as an action of account would not lie in such a case, there never was an action at law by which this object could be accomplished. On the other hand, the object of a defence of want of assets, to an action against an executor by a creditor of his testator, is to defeat the action, and, of course, it is always the executor who wishes to accomplish that object. But the only way of making want of assets a defence to such an action, and thus defeating the action, is by showing that the executor has no assets, or that he has none which are applicable to the payment of the plaintiff's debt, or that he has only a stated amount of assets, being an amount insufficient to pay the plaintiff's debt. If, then, the executor plead that he has no assets, and the creditor traverse the plea, and issue be joined upon the traverse, the question at the trial will be, not how much assets the executor has, nor whether he has enough to pay the plaintiff's debt, but whether he has any. If this question be decided in the negative, the plaintiff will fail in his action.[1] If it be decided in the affirmative, the plaintiff will have a verdict and judgment for his whole demand.[2] And it may be remarked that this result has at least one merit; namely, that it makes it very perilous

[1] 1 Rol. Abr. 929 (B), pl. 2.

[2] 1 Rol. Abr. 929 (B), pl. 1.

for an executor, who must be supposed to know the facts, to plead falsely. Unless, therefore, it is very clear that he can show a total want of assets, it will stand him in hand to consider whether he will not adopt the third mode of pleading, in which case the plaintiff may admit the plea to be true, and take judgment for his debt, to be levied immediately to the extent of the assets admitted, the remainder to be levied of assets which shall afterwards come to the executor's hands (*quando acciderint*[1]), or the plaintiff may traverse the plea; and in that case the whole action will turn upon the question whether the executor has any more assets than he has admitted. Formerly, however, it often happened, in England, that an executor, who was sued by a creditor of his testator, had assets in his hands, but they were all applicable to the payment of debts of a higher degree than the plaintiff's, and which were, therefore, entitled to be paid before the plaintiff's; and in that case the executor adopted the second mode of pleading; and he was then required to specify in detail all the debts of a higher nature than the plaintiff's, for the payment of which he claimed that the assets in his hands were bound. When the executor's plea took this shape, the creditor could either traverse the allegation that the executor had no assets beyond the amount of preferred debts set out in the plea, or he could traverse the existence of the preferred debts, or of a sufficient portion of them to bring the remainder within the limits of the assets admitted by the executor. In short, the creditor could either deny that the assets amounted to so little, or that the preferred debts amounted to so much, as the executor claimed.[2]

Such, it is conceived, is the true theory of the common-law defence of want of assets, pleaded by an executor to an action brought against him by a creditor of the testator; and there is believed to be no room for doubt that, in early times, theory and practice were in this respect in entire harmony with each other.[3] There was, however, long since a departure from principle in one particular which introduced a great change in practice. Thus, as early as the time of James I., in a case reported by Lord Coke,[4] where the debt sought to be recovered was £200, and issue

[1] See Noell *v.* Nelson, 2 Wms. Saund. 214.

[2] See Hancocke *v.* Prowd, 1 Wms. Saund. 328, with Serjeant Williams's notes.

[3] See *infra*, pp. 120–1.

[4] Mary Shipley's Case, 8 Rep. 134 *a*.

was joined on the traverse of a plea of *plene administravit*,[1] and the jury found that the executor had assets to the amount of £175 only, the court, while holding that the plaintiff was entitled to judgment for £200, besides damages and costs, intimated that the plaintiff would be entitled to levy only £175; and, in the time of Charles I., in a case similarly circumstanced, the court said: "When it is found that the defendant hath some assets, although of little value, so as he hath not fully administered, the plaintiff shall have judgment for the entire debt, but he shall not have execution but of as much as is found, and shall not be barred for the residue; and if more assets come afterwards, he may have a *scire facias* to have execution thereof."[2] This is certainly an extraordinary doctrine, as it involves a plain contradiction. The court, having given judgment that the plaintiff recover his entire debt, to be levied of the goods and chattels of the testator in the executor's hands (*i.e.*, the whole of it to be so levied, and levied immediately), said, nevertheless, that the plaintiff could, by virtue of that judgment, have execution for a part of his debt only, and that, in order to obtain an execution for the remainder, he must bring a *scire facias* (*i.e.*, a new action in effect), prove new facts, and obtain a second judgment, — which, however, could be (and was) only a repetition of the first. And yet this doctrine continued to be recognized and acted upon until the time of Lord Mansfield.[3] That it was, however, a departure

[1] An executor's plea of want of assets is commonly called a plea of *plene administravit*, because it begins with an allegation that the defendant hath fully administered all the goods and chattels which were of his testator at the time of his death, but then the plea immediately adds, that the defendant hath no goods or chattels which were of said testator at the time of his death in his hands to be administered, nor had at the commencement of the action, or at any time since; and this negative allegation is the material part of the plea, and the part on which a traverse must be taken. Reeves *v.* Ward, 2 Bing. N. C. 235. The plea was also formerly known as a plea of *riens entre mains*, and that seems to be a better name for it than *plene administravit*. See *infra*, p. 120, n. (2).

[2] Dorchester *v.* Webb, Cro. Car. 372–373.

[3] Thus, in the great case of the Bank of England *v.* Morice, 2 Str. 1028, Cas. *t.* Hardw. 219, which was decided during Lord Hardwicke's chief justiceship, and in which the form of the judgment was specially considered and settled by the court, the jury found that the plaintiff's debt amounted to £28,993 8s. 1d., and that the defendant had assets, applicable to the payment of the plaintiff's debt, amounting to £14,659 12s. 9d.; and the judgment was in effect that, inasmuch as the assets amounted only to the sum last named, *therefore* the plaintiff recover his entire debt, with costs amounting to £200 7s. 7d., thus making in all £29,193 15s. 8d., to be levied *de bonis testatoris!* See Cas. *t.* Hardw. 230–31, where the judgment is given *verbatim*. It is not too much to say that this judgment is upon its face quite unintelligible.

from a more ancient practice, seems to be clear; for if the law had always been, in regard to the execution, as the court declared it to be in Dorchester *v.* Webb, the judgment would have been that the plaintiff recover his debt, to be levied immediately to the amount of the assets found in the executor's hands, and as to the remainder to be levied of assets which should afterwards come to the executor's hands; and, if a change was to be made, the judgment should have been first changed, and then the corresponding change in the execution would have followed as a matter of course. As it was, however, the execution was changed while the judgment was permitted to retain its original form; and it remained for Lord Mansfield to make the execution conform to the judgment by changing the form of the latter in the manner just suggested.[1] Since this latter change was made, therefore, whatever may be said of the judgment and execution, taken together, they have at least had the merit of consistency.

This change in the execution caused an important change in the trial, and in the function of the jury; for, as soon as it was decided that the plaintiff could have immediate execution for the amount only of the assets in the executor's hands, it became necessary for the jury to inquire, and find by their verdict, how much assets was in the executor's hands; and the only way of doing this was for the jury to ascertain, first, how much assets the executor had received, or would have received if he had done his duty; then, how much he had justly and legally paid out, and how much, if any, he had lost without his fault; and the difference between these two aggregates would be the amount in the executor's hands, either actually or in legal contemplation. This, however, is neither more nor less than taking an account, — it is the precise process which has to be gone through with in every account that is taken.

The courts, therefore, in thus changing the nature of the trial, lost sight of the nature of the action, of the defendant's plea, and of the issue joined, and required the jury to do something very

[1] Harrison *v.* Beecles, cited 3 T. R. 688. This was an action of assumpsit, to which the defendant pleaded *plene administravit.* At the trial, before Lord Mansfield, the plaintiff proved a debt of £80, and the defendant was found to have assets amounting to £25. The plaintiff's counsel insisted that he was entitled to a verdict for his whole debt. Lord Mansfield said: "The law was certainly understood to be so, and there are a hundred cases so determined. This struck me as absurd and wrong." Accordingly, the plaintiff had a verdict and judgment for £25, and a judgment of assets *quando acciderint* for the residue of his debt.

different from trying the issue which they had been impanelled to try, and something which they were not competent to do properly.

The matter must, however, be looked at from still another point of view. Independently of any of the changes before referred to, the issue joined upon a traverse of a plea of *plene administravit* always involved an anomaly in respect to the burden of proof. That issue was, as we have seen, whether the executor had any assets in his hands applicable to the payment of the plaintiff's debt, or any more than he had admitted having. Upon this issue the plaintiff held the affirmative; for if the executor had assets which he denied having, that was an affirmative fact; and yet the executor had the burden of proof, for the issue was joined upon a traverse of his affirmative plea (*i.e.*, affirmative in law, though negative in fact), and, therefore, he must prove his plea in order to succeed in the action. But how could the executor prove that he had no assets, or only a stated amount of assets? Of course he could show what assets he had disposed of, and how; but that would signify nothing until it appeared what assets he had received. How could this latter fact be made to appear? Only in one way, namely, by proof on the part of the plaintiff; and hence the anomaly just alluded to, and which consisted in this, namely, that, while the executor had the burden of proof, the plaintiff (the creditor) had to begin at the trial by proving the receipt of assets by the executor, and then the executor proceeded to show what had become of the assets with which the plaintiff's evidence had charged him; and this anomaly existed equally, whether the jury were confined to a trial of the issue, according to what the writer conceives to have been the original and proper practice, or whether they were required to take an account, according to the modern practice.[1] But how could a creditor of the testator prove what amount of assets the executor had received? Clearly, he could not do it (except by accident) without the executor's assistance; and yet a common-law court had no means of compelling an executor to give such assistance to a creditor. The creditor could, of course, file a bill for discovery, but that

[1] In Dean and Chapter of Exeter *v.* Trewinnard, Dyer, 80 *a*, in the time of Edward VI., to a *scire facias* against an administrator on a judgment recovered against the intestate, the defendant pleaded *plene administravit*, on which there was an issue; and the reporter says: "In giving the evidence to the jury the defendant commenced first. Note this, for I believe it is unusual, because he is in the negative, for the conclusion of *plene administravit* is, and so nothing within his hands (*riens entre mains*)."

would scarcely answer his purpose, as he could only by that means compel the executor to answer categorically specific charges or interrogatories. The ecclesiastical court, indeed, required the executor to make and file in its registry a sworn inventory of the testator's personal estate; and this, if properly done, would serve the creditor's purpose, at least down to the time when the inventory was sworn to; for the inventory would of course be evidence against the executor as an admission by him. There were two reasons, however, why a creditor should not have been satisfied with such assistance from the executor as he would obtain through the ecclesiastical court: first, it was a hardship on the creditor to have to sue the executor both in an ecclesiastical court and in a common-law court, in order to recover a debt about which there was no controversy;[1] secondly, the Court of King's Bench held (strangely enough) that the ecclesiastical courts had jurisdiction only to compel an executor to file *an* inventory, — not to compel him to file a sufficient and proper inventory; and hence, if one of those courts attempted to do the latter, the King's Bench would grant a prohibition, on the application of the executor.[2] The creditor, therefore, could only obtain such an inventory as the executor chose to swear to and exhibit.

Such were the obstacles which a creditor was liable to encounter who sued the executor of his deceased debtor at law. Did they constitute a sufficient reason for permitting him to sue in equity? This question must be answered in the affirmative. First, justice to the creditor and to the executor alike required that an account should be taken of the assets received by the executor, unless the latter was willing to admit that he had sufficient assets to pay the plaintiff's debt. Even, therefore, if courts of law had never attempted to take an account in such cases, equity would have been abundantly justified in assuming jurisdiction. Secondly, although the courts of common law attempted, in the manner already explained, to convert the trial of a common-law issue into the taking of an account, yet they did not thereby render the in-

[1] In Mara *v.* Quin, 6 T. R. 1, 6, it appeared that, after issue was joined, the plaintiff had to cite the defendant in the ecclesiastical court to exhibit an inventory, and that it took him nearly two years to accomplish that object, during which time, of course, the trial was delayed.

[2] Hinton *v.* Parker, 8 Mod. 168; Catchside *v.* Ovington, 3 Burr. 1922; Henderson *v.* French, 5 M. & S. 406; Griffiths *v.* Anthony, 5 Ad. & El. 623. That the ecclesiastical courts did not accept this view, see Telford *v.* Morison, 2 Addams, 319.

terference of equity unnecessary, — they only changed the ground for such interference. As equity always held that courts of common law were not competent to enforce an accounting properly, even in an action expressly framed for that purpose, and in which a special tribunal was provided for taking the account after a jury had decided that an account ought to be taken, it would be a waste of time and space to argue that they were not competent to do it in a case where the form of action, the nature of the pleadings, the question to be tried, and the mode of trial, — all forbade their even attempting to do it. Thirdly, justice to the creditor imperatively required that an executor, who refused to admit sufficient assets to pay him, should render an account of the assets received by him under oath, *i.e.*, that he should make up and bring in an account, containing a full and minute enumeration and description of the items of charge and items of discharge, the former consisting of the assets received by him, the latter of the payments, etc., made by him,[1] and that he should make oath to the truth and completeness of such account, — in particular that it omitted nothing of the personal estate of the testator which had come to the executor's knowledge;[2] and, this having been done, justice further required that the executor should answer categorically and under oath all such proper charges and interrogatories as the creditor should make and propound. All these advantages the creditor who sued in equity obtained as a matter of course, while the creditor who sued at common law could obtain such of them only as might be afforded by the inventory which the executor could be required to exhibit in the ecclesiastical court, and even that inadequate substitute for the assistance which equity would afford to him, the creditor could obtain only at the expense of two suits.

Such, it is conceived, are the reasons (still existing) which justified equity in assuming jurisdiction over creditors' bills against executors. Another reason, however, formerly existed, which seems to have had considerable (though it is difficult to say how much) influence in establishing the jurisdiction; and, though it was a reason which has now ceased to have much force, even in England, yet it would be wrong to omit all mention of it.

Debts are of three principal degrees or grades; namely, simple contract debts, which are the lowest; debts created by specialty, which are the next higher; and debts created by matter of record,

[1] See Vol. 3, p. 259, n. (1).

[2] See Vol. 3, p. 241.

including judgments, which are the highest of all. Formerly, moreover, when a debtor died, his debts were required to be paid in the order of their grade; namely, debts by matter of record first, specialty debts next, and simple contract debts last of all. Specialty debts and debts by matter of record had also other important advantages, which will be mentioned hereafter. For these reasons, it was, of course, a matter of importance to a creditor that his debt should be of as high a nature as practicable, and therefore specialty debts and debts by matter of record were incomparably more common than they are now. The form of specialty by which debts were created was almost invariably a bond with a condition, *i.e.*, a bond by which the debtor acknowledged himself bound to the creditor for a sum larger than (generally twice as large as) the real debt, with a condition making the bond void on payment of the amount actually due by a day named. The larger sum was, therefore, in the nature of a penalty incurred by the debtor in the event of his failing to pay the smaller sum according to the terms of the condition; and yet, upon breach of the condition, the larger sum became the actual legal debt.

The matters of record by which debts were created were judgments, recognizances, and statutes. Judgments were rendered either *in invitum* or upon confession. The object of confessing a judgment was to give a creditor the security afforded by a judgment for the payment of his debt; and hence a judgment confessed was, like a bond, generally for a larger sum than was actually due, and so was in the nature of a penalty. A recognizance was (and is) an acknowledgment of a debt in a court of record, the acknowledgment thus becoming a record; and it is usually given in an action or in some other legal proceeding (*e.g.*, bail always become bound in a recognizance); and its object generally is to secure the payment of a smaller sum, or the doing of some other act. Statutes (now obsolete) were formerly very common in England, and were either statutes merchant, statutes staple, or recognizances in the nature of statutes staple.[1] They differed in substance from bonds only in this, that they derived their efficacy, not from being sealed and delivered by the debtor, but from being acknowledged by him before a judge or other officer designated

[1] Statutes merchant had their origin in the statute *De Mercatoribus*, 13 Edward I., statute 3; statutes staple, in the statute of 27 Edward III. c. 9; and recognizances in the nature of statutes staple, in the statute of 23 Henry VIII. c. 6.

by statute, and thereupon becoming, by force of the statute, matters of record.

It will be seen, therefore, that all debts by matter of record, except judgments rendered *in invitum*, as well as all specialty debts, after the conditions on which they originally depended were broken, were generally in the nature of penalties. It will be seen also (indeed it has already been seen) that an executor who was sued at law by a creditor of his testator, and who had an amount of assets in his hands equal to the plaintiff's debt, might yet defend himself by showing that such assets would all be required for the payment of debts of his testator of a higher nature than the plaintiff's debt; and for this purpose debts which were in the nature of penalties only were as good as any other debts, for they were still legal debts. And yet, as equity would always relieve against penalties, all that equity would permit the owners of such debts to recover was the amount actually due; namely, principal, interest, and costs. An executor might, therefore, defeat a creditor at law by means of legal debts of a higher nature which had no existence in equity, *i.e.*, when there were assets enough to pay all debts of a higher nature which were due in equity, and also to pay the plaintiff in full. Creditors, therefore, who were met with such a defence were frequently driven into equity, not only as the sole means of ascertaining the truth in regard to debts of a higher nature due from their debtor, but as the sole means of obtaining payment from a solvent estate; namely, by compelling creditors of a higher nature to extinguish the debts due to them by way of penalties on receiving principal, interest, and costs.[1]

[1] According to the ancient mode of pleading, when an executor pleaded debts of a higher degree than the plaintiff's, and alleged that he had not more than sufficient assets to pay the former, it never appeared, upon the face of the defendant's plea, whether such debts of a higher degree were penalties or not. The case of Page *v.* Denton, 1 Ventr. 354, is said to have been the first in which a different mode of pleading was adopted. There, an executor pleaded a bond given by the testator to himself, and stated that the condition of it was to pay rent, and that, at the time of the testator's death, the sum of £300 was due from the testator to the defendant for rent; and the court commended the defendant's mode of pleading by saying: "If men would plead their case specially, it would save many a suit in Chancery." This remark proves that creditors' bills, the object of which was to ascertain, not the amount of assets, but the amount of preferred debts, were then well known. An instance will also be found in Pigott *v.* Nower, 3 Swanst. 534, *note*, of a creditor's bill, filed as early as February 1, 1671, the object of which was to ascertain the amount of actual debt for which certain judgments had been confessed by the defendant as administratrix of her husband. In Parker *v.* Dee, 2 Ch. Cas. 200, Cas. *t.* Finch, 123, 3 Swanst. 529, *note*, the plaintiff had first brought an action at law, to

It will not have escaped the observation of the attentive reader that all of the reasons which have been given for permitting the creditor of a deceased debtor to sue the executor of the latter in equity, are confined to cases in which, if the creditor sue at law, he will be met with the defence of want of assets. Ought equity, then, to have entertained a bill by a creditor who gave no reason for supposing that he would be met at law by such a defence? In answer to this question, it may be observed that it would have been impracticable for equity to entertain the inquiry whether the defence of want of assets would be set up at law or not, as in numberless cases it would have been a matter of pure conjecture. The only way, then, of limiting the jurisdiction would have been to require every creditor to sue at law first, and to permit a creditor to sue in equity only when he had been met at law with the defence of want of assets. A consequence of such a course, however, would have been that, as an action at law and a suit in equity cannot be prosecuted concurrently for the same claim, a creditor, upon suing in equity, must have discontinued his action at law,[1] and that he could have done only upon payment of costs. To have limited the jurisdiction, therefore, in the manner suggested, would have imposed a heavy burden upon creditors as a condition of their suing in equity, and that, too, without any corresponding advantage to the estates of deceased debtors. It would also have placed in the hands of executors a powerful instrument of delay in precisely those cases in which the temptation to an executor to hinder and delay the creditors of his testator is strongest. Accordingly, it became settled at an early day that the jurisdiction of equity was subject to no condition or limitation whatever.[2]

It is further to be observed that the reasons which have been given for the jurisdiction relate entirely to the immediate relief sought, namely, either an admission of assets or an accounting, —

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which the defendant had pleaded several judgments, which were upon penal bonds, and that he had no assets *ultra*, etc.; whereupon the plaintiff filed a bill (in April, 1668), "to discover the truth of the plea, and debts therein set forth, and the assets." See also Bank of England *v.* Morice, 2 Str. 1028, Cas. *t.* Hardw. 219.

[1] In Parker *v.* Dee, *supra*, the plaintiff was compelled to elect whether he would sue at law or in equity, and he elected to sue in equity.

[2] In Pigott *v.* Nower, *supra*, Lord Nottingham said: "If a man foresee that *plene administravit* may be pleaded at law, and then come first into equity, as he may, why should not that avail him as much as if he had falsified such a plea? For a man is not bound to play an aftergame, and stay till he be hurt by a plea. It is no cause of demurrer to a bill for discovery of assets, that fully administered is not yet pleaded."

not at all to the final relief sought, namely, payment of the debt; and yet it has never been doubted, since the time of Lord Nottingham,[1] that the admission of assets or the accounting should be followed up by a decree for the payment of whatever the plaintiff is found entitled to receive; and this decree is made upon the principle of avoiding a multiplicity of suits. The ultimate relief, therefore, is consequential upon the primary relief, a creditor's bill against an executor being in this respect like a bill for an account.[2]

Creditors' bills against executors constitute one of the oldest heads of equity jurisdiction. At how early a date this jurisdiction was habitually exercised, it seems impossible to say. It was well established in the time of Lord Nottingham;[3] and before his time few doctrines of equity were well settled, or can be accurately traced.

We must now inquire into the rights of a creditor of a deceased debtor to call upon equity to assist him in enforcing payment of his debt out of the land of his debtor. It has already been remarked that feudalism secured complete dominion over the land of deceased persons; and that is the reason that the land of a deceased person descends to his heir, instead of going to his executor. What effect had this upon the rights of creditors? The chief object of feudalism was to secure the performance by tenants to their lords of the services for which the former held their lands from the latter. Hence feudalism did not favor the claims of creditors; for, if the creditors of a tenant could compel payment of their debts out of the tenant's land, the latter might be unable to perform his services to his lord, and if the creditors of a deceased tenant could compel payment of their debts out of the land which had descended to the tenant's heir, the latter might be unable to perform the services to his lord, the obligation to perform which had descended to him with the land. Hence, in English-speaking countries, the rights of creditors against the land of their debtors depend almost wholly upon statute. A judgment creditor could, indeed, at common law take in execution

[1] In Parker *v.* Dee, *supra*, the plaintiff having obtained an account, the defendant pressed for a dismissal of the bill; but Lord Nottingham said (1 Eq. Cas. Abr. 130, pl. 5, 2 Ch. Cas. 201): "When this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

[2] See Vol. 2, p. 259; Vol. 3, pp. 238, 242.

[3] See Parker *v.* Dee and Pigott *v.* Nower, *supra*.

(by cutting and gathering) any crops which he might find on his debtor's land,[1] but he could not acquire any right to the possession of the land, — still less could he sell it, or become himself the owner of it.[2] And even when the Legislature interfered in favor of judgment creditors (as it did in the thirteenth year of Edward I.),[3] by giving them the right to have their debtors' land extended (*i.e.*, the annual value of it appraised, and the possession of it delivered to them, with the right to retain such possession at the appraised value, until by that means their judgments were satisfied), such right was limited to one half of the debtor's land; and it was not till nearly six hundred years later (namely, in 1838)[4] that judgment creditors acquired in England the right to have the whole of their debtors' land thus extended; and to this day they cannot, in England, either sell their debtors' land upon execution, or themselves become the owners of it.

What were the rights, at common law, of the creditors of a deceased debtor against the land of the latter which had descended to his heir? The answer is, that, as creditors of the deceased debtor, they had no rights whatever. As, however, the heir had a legal right to inherit all the land of which his ancestor died seised in fee, of which right the ancestor could not deprive him, so the ancestor had a right by deed to bind his heir to the extent of the land which descended from him to the latter. Hence, whenever a bond was given by which the obligor in terms bound not only himself, but also his heirs, the consequence was that, upon the death of the obligor, his heir became personally liable on the bond, just as if he had given it himself, except that his liability was limited to the land which descended to him. This liability of the heir was, however, limited to debts by specialty for which the heir was expressly bound. It was a privilege in which even debts by matter of record did not share. And even in respect to specialty debts for which the debtor's heir was expressly bound, the right of the creditor to proceed against the heir became

[1] This was done under the writ of *levari facias*, — a writ which has long been obsolete, except in a few special cases. From it, however, we have derived the familiar term "levy," — a term which is constantly applied, though not with strict accuracy, to a writ of *fieri facias*. Thus under a writ of *fieri facias* the sheriff is said to "levy" the amount due on the judgment, though the writ commands him to "make" that amount.

[2] See Sir William Harbert's Case, 3 Rep. 11 *b*–12 *a*.

[3] Namely, by statute of Westminster 2, c. 18.

[4] By 1 & 2 Vict. c. 110, § 11.

very precarious; for, first, if the heir sold the land which had descended to him before he was sued upon a bond of his ancestor (an action actually brought against the heir was notice to a purchaser), the right of the creditor was entirely defeated. He could no longer proceed against the heir, for his execution (as we shall see) was only against the land itself; and he could no longer have an execution against the land, for it had become the property of the purchaser. Secondly, after lands became devisable,[1] a debtor could entirely defeat his creditors' rights against his land by devising the latter; for the creditor would then have no right against the heir, as the latter would inherit nothing from his ancestor, and he would have no right against the devisee, as the latter would be under no obligation to him. These two mischiefs were, however, remedied soon after the English Revolution, by 3 & 4 Wm. & M. c. 14.

What was the remedy at law of a specialty creditor against an heir? In some respects it was very similar to his remedy against the executor, but in other respects it was materially different. First, the creditor brought an action of debt against the heir upon the bond; but as the heir was personally liable, the action was in the *debet et detinet*, — not in the *detinet* only, as in case of an action of debt against an executor. Secondly, if the heir had no assets by descent, he must plead that fact as an affirmative defence;[2] otherwise it would be assumed that he had sufficient assets.[3] If he did so plead, and the plaintiff traversed his plea, and issue was joined upon the traverse, the question at the trial was, whether the heir had *any* assets by descent. If the jury found that he had not, of course their verdict was in his favor; but if they found that he had assets, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would have judgment for his entire debt against the heir personally.[4] If the heir had some assets, but yet wished to guard against any liability beyond such assets, he must plead that he had no assets except what were specified in his plea,

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[1] By 32 Henry VIII. c. 1.

[2] The plea by which such a defence is set up is called a plea of *riens per descent.* See *supra*, p. 110, n. (1).

[3] Henningham's Case, Dyer, 344 *a*; Brandlin *v.* Millbank, Carth. 93, Comb. 162; Smith *v.* Angel, 7 Mod. 40, 1 Salk. 354; 2 Ld. Raym. 783; Hinde *v.* Lyon, 2 Leon. 11; Davy *v.* Pepys, Plow. 438 *a*.

[4] 21 E. 3, 9 *b*, cited in Davy *v.* Pepys, Plow. 438 *a*, 440. Such a judgment is called a *general* judgment against the heir.

and then he must specify and describe the assets which he had by descent. If the heir so pleaded, and the plaintiff did not choose to controvert the truth of the plea, the latter could take judgment for his entire debt, his execution, however, to be limited to the assets in the heir's possession.[1] If, however, the plaintiff traversed the plea, and issue was joined on the traverse, the question at the trial was whether the heir had any more assets than he had admitted. If the jury found that he had not, their verdict must be in his favor, and hence the plaintiff lost the benefit of such assets as the heir admitted that he had.[2] If the jury found that the heir had more assets than he had admitted, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would be entitled to a judgment for his entire debt against the heir personally.[3] It will be seen, therefore, that judgments against heirs differed from judgments against executors in two particulars; namely, first, that a judgment against an heir was always for the full amount of the plaintiff's debt, though the execution might be limited to the assets in the heir's possession; secondly, that, whenever a judgment against an heir rendered him personally liable, the judgment was against him personally in form, as well as in legal effect. The reason of the first of these differences was that an executor who admitted a limited amount of assets in his hands, did not specify such assets, but stated their value in money; and hence the proper way of limiting the executor's liability to the amount of assets in his hands was by limiting the judgment to the amount of money admitted by the executor to be the value of the assets in his hands. An heir, on the other hand, who admitted a limited amount of assets, specified and described such assets, but did not state their value. Indeed, as we shall see presently, the only question, as to the value of such assets, was as to their annual value, and that was not ascertained till after an execution had issued; and hence the only way of limiting the heir's liability was by limiting the execution to the specific assets in the heir's possession. The reason of the second difference was that, as the heir was bound by the bond, and as the assets which he had received by descent were as much his own as any of his

[1] Anon., Dyer, 373 *b*, pl. 14; Davy *v.* Pepys, Plow. 438 *a*. Such a judgment is called a *special* judgment against the heir.

[2] See 1 Rol. Abr. 929 (B.), pl. 2.

[3] Hinde *v.* Lyon, 2 Leon. 11; *per* Holt, C. J., in Smith *v.* Angel, 7 Mod. 40, 44. See *supra*, p. 120, n. (4).

other property, there was no reason why a judgment against him should not bind him personally, in form as well as in legal effect, unless he employed the proper means for limiting the judgment to the assets by descent in his possession.

In respect to the mode in which it was enforced, a judgment against an heir differed widely from a judgment against an executor. A general judgment against an heir, *i.e.*, a judgment which was not limited to the assets which he had by descent, did not differ at all, either in its form or in respect to the mode in which it was enforced, from ordinary judgments. On the other hand, a special judgment against an heir, *i.e.*, a judgment which was limited to the assets which he had by descent, could be enforced only against such assets. What was the nature of the execution which issued on such a judgment? At common law, as well as by statute in England, the only kind of execution against land was (and is) an extent.[1] Ordinarily, as has been seen, the land of a judgment debtor could not be taken on execution at common law, and even when an extent was given by statute it was limited to one half of the land belonging to the judgment debtor; but a judgment against an heir on the obligation of his ancestor, *i.e.*, when the judgment was limited to the assets which the heir had by descent, was an exception to the general rule in both of the foregoing particulars; and the reason is obvious. If such a judgment could not have been satisfied out of the land which had descended to the heir, it could not have been satisfied at all, and so would have been worthless.[2] Therefore, an extent could be issued on such a judgment at common law; and whenever an extent issued at common law,[3] it went against all the land that was liable, the arbitrary limitation of an extent to one half of the debtor's land existing only by statute.

Such, then, being the remedy provided by the common law for enforcing against an heir an obligation imposed upon him by his

[1] See *supra*, p. 119. The reader must not be misled by the name of a writ of *elegit*. This name (which was taken from a word which the writ always contained when legal proceedings were in Latin) has nothing to do with the nature or legal operation of the writ. Every *elegit* is an extent, though not every extent is an *elegit*. An extent made under an *elegit* differs from other extents only, first, in being made under the authority of a statute, and, secondly, in being limited to one half of the land.

[2] See Sir William Harbert's Case, 3 Rep. 11 *b*, 12 *a*.

[3] An extent at the suit of the king is the typical case of an extent at common law. Land could always be taken in execution to satisfy a judgment in favor of the king.

ancestor, was there any sufficient reason for permitting the owner of such an obligation to sue in equity? It may be admitted at once that the reason which had, perhaps, the greatest force in the case of an executor, namely, the incompetency of a jury to take an account, had but little force in case of an heir; for as against an heir there was no account to be taken, and the question, what land an heir had by descent, was not an unfit question for a jury to deal with. There were, however, other reasons for permitting an heir to be sued in equity, which are believed to have been abundantly sufficient. First, when an heir alleged that he had not sufficient land by descent to enable him to perform an obligation imposed upon him by his ancestor, justice required that it be ascertained what land he had by descent; and yet all that the common-law courts did, or could properly do, was to ascertain whether he had *any* land by descent, or any more than he had admitted having. Secondly, in order to ascertain how much land an heir had by descent, or whether he had any, or whether he had any more than he had admitted having, it must first appear of what land the ancestor died seised in fee simple, and that must be shown by the creditor; and yet it is a fact which the creditor would not presumably be able to show without assistance from the heir. Justice, therefore, required that the heir should state upon oath of what land his ancestor, to his knowledge, died seised in fee simple;[1] and yet equity alone could compel an heir to do this, an heir not being amenable to the ecclesiastical courts, nor required to exhibit an inventory of his ancestor's lands. But, thirdly, the part of the common-law remedy which was most strikingly inadequate was the execution. An extent is a very unsatisfactory execution at best; for it requires the creditor to take possession of the land, and hold it (in effect) as a lessee, at a rent fixed by a sheriff's jury, until he obtains satisfaction of his judgment by retaining the rent; and it may be years before this object will be accomplished. As against an heir, however, the inadequacy of such an execution is still more marked. When a debtor dies, as it is then certain that the property which he leaves behind him constitutes the only means by which his debts will ever be paid, justice to his creditors requires that his property be applied at once to the payment of his debts. When, therefore, a creditor obtains a judgment which must be satisfied, if at all, out of his

[1] See *supra*, p. 114.

debtor's land, the judgment ought to be satisfied out of the *corpus* of such land, and there is no propriety in compelling the creditor to wait until he can obtain satisfaction out of the income. But this is not all; for, if there were several creditors, they could enjoy the land only in succession, and hence, when one had obtained a judgment and extended the land, all the others must wait till his debt was satisfied, and the last one must wait till all the others' debts were satisfied; and yet the *corpus* of the land might be sufficient to pay all the creditors in full. Fourthly, as an extent had no retroactive effect, there was no way, at common law, of reaching the income of the land between the ancestor's death and the making of the extent; and yet the land could not be extended until an action had been brought against the heir, and a judgment recovered.

For the foregoing reasons, it seems never to have been doubted that an heir could be sued in equity by a creditor of his ancestor. Equity treated an heir just as it did an executor, *mutatis mutandis*, *i.e.*, it held him liable only to the extent of assets which he had received by descent; but it held that the *corpus* of such assets, as well as the rents and profits produced by them subsequently to the ancestor's death, should be applied immediately to the payment of those specialty debts of the ancestor for which the heir was bound. Accordingly, when, upon a bill filed against the heir by the owner of such a debt, the plaintiff had proved his claim, and the court had ascertained what land the heir had by descent, a decree was made that such land, or a sufficient portion of it, be sold under the direction of a Master, that the heir execute a conveyance pursuant to the sale, and that the proceeds of the sale be applied, so far as necessary, to the payment of the plaintiff's claim, the surplus, if any, going to the heir;[1] and, if necessary, the decree further directed an account by the heir of the rents and profits of the land between the death of the ancestor and the sale.[2]

I have said that debts by matter of record did not share with specialty debts the advantage of being secured by the liability of the heir. The former, however, in turn had advantages of their own, which they did not share with debts of any other class. First, all matters of record (and therefore recognizances and stat-

[1] See Seton, Decrees (1st ed.), pp. 82, *et seqq.*; Eddis, Administration of Assets, c. 7.

[2] Davies *v.* Topp, 1 Bro. C. C. 524, Seton, Decrees (1st ed.), pp. 95–8; Stratford *v.* Ritson, 10 Beav. 25; Schomberg *v.* Humfrey, 1 Dr. & W. 411.

utes) stand upon the same footing as judgments in this respect; namely, that they neither require proof, nor can be impeached. Therefore, an execution can issue upon a recognizance or statute just as upon a judgment. Secondly, the statute of Westminster 2 (13 Edward I.), c. 18, having given to conusees of recognizances, as well as to judgment creditors, a right to extend one half of the land of their conusors or judgment debtors, this right was held to constitute a general lien upon the land of the conusors or judgment debtors, as well that which they owned when the recognizance was acknowledged or the judgment recovered, as that which they afterwards acquired; and the death of a conusor or judgment debtor did not affect this lien, or the right to issue an execution to enforce it, otherwise than by making it necessary for the conusee or judgment creditor first to issue a *scire facias*. Hence, such conusee or judgment creditor, while he could not maintain an action against the heir of the deceased conusor[1] or judgment debtor, and had no claim upon more than one half of the land which had descended to such heir,[2] yet he could (subject only to the condition of first issuing a *scire facias*) issue an execution, and have one half of such land extended, including not only the land which the conusor or judgment debtor owned at the time of his death, but also the land which he owned when the recognizance was acknowledged or the judgment recovered, or had owned at any time since, whoever might be the owner of it when the extent was made; and this was a right of which the creditor could not be deprived except by his own act.

Conusees of statutes, in respect to their rights against the land of their conusors, had an advantage even over judgment creditors and conusees of recognizances; for the statutes, from which the rights of the former were derived, authorized them to have all the land of their conusors extended instead of one half of it.[3]

Could then a judgment creditor, or a conusee of a recognizance or statute, instead of resorting to his *scire facias* and execution at law against the land of his deceased judgment debtor or conusor, file a bill in equity against the owner or owners of such land? As against any one but the heir or devisee of the judgment debtor or conusor (*i.e.*, as against any one who had acquired his title before

[1] Sir W. Harbert's Case, 3 Rep. 11 *b*, 15 *a*; Anon., Dyer, 271 *a*, pl. 25; Stileman *v.* Ashdown, 2 Atk. 608.

[2] See Stileman *v.* Ashdown, *supra*.

[3] Sir W. Harbert's Case, 3 Rep. 11 *b*, 12 *a*.

the death of the latter), he clearly could not; for as to such a person his position would not be at all changed by the death of the judgment debtor or conusor, nor would he have any equity against him. Could he file a bill against the heir or devisee of the deceased judgment debtor or conusor to reach the land which had descended or been devised to him? In favor of a negative answer to this question, it may be said that the execution at law against land was not open to so great an objection in the mouth of a creditor by matter of record as in the mouth of a specialty creditor; for the rights of creditors by matter of record were always successive, priority of time giving priority of right, while the rights of all specialty creditors were concurrent and equal. Still, the question must be answered in the affirmative, equity holding that every creditor of a deceased debtor is entitled to have all the debtor's property, so far as he has a claim upon it, applied immediately to the payment of his debt; and therefore the relief given, in the case now under consideration, was the same that was given upon a bill by a specialty creditor, namely, a sale of the land (or of one half of it, as the case might be), with an account of the rents and profits, if necessary, until the sale took place.[1]

There is also another independent ground upon which the jurisdiction of equity over creditors' bills against heirs or devisees may be sustained, namely, that of preventing a multiplicity of suits. To a bill by a creditor against an executor, an heir or devisee was never a necessary party; but to a bill by a creditor against an heir or devisee as such, the executor was always a necessary party.[2] The reasons for the difference are these: first, every creditor of a deceased debtor is entitled by law to be paid out of the debtor's personal estate, while only privileged classes of creditors are entitled to be paid out of his land; and therefore every creditor who is entitled to sue the heir or devisee of his deceased debtor, is entitled *à fortiori* to sue his executor, while the converse, of course, does not hold. Secondly, as between the personal estate and the land of a deceased debtor, the debts of the latter fall by law upon the personal estate, and therefore the land is entitled to be exonerated from the debts by the personal estate. In other words, the land, even when it is liable to the creditor, is by law liable

[1] Stileman *v.* Ashdown, 2 Atk. 477, 481, 608, Ambl. 13.

[2] Knight *v.* Knight, 3 P. Wms. 331; Plunket *v.* Penson, 2 Atk. 51; Robinson *v.* Bell, 1 De G. & Sm. 630.

only as surety for the personal estate, which is the principal debtor. Therefore, though the creditor is entitled to go against the land or the personal estate, at his pleasure,[1] yet, if he wish to go against the land in equity, he will be required to go against the personal estate at the same time, by making the executor a co-defendant to his suit, and praying relief against him as well as against the heir or devisee; and thereupon the court will direct the personal estate to be applied in the first instance to the payment of the plaintiff's debt, and will direct so much only of the debt to be paid out of the land as shall remain unpaid after the personal estate has been exhausted.[2] If, however, an heir or devisee could not be sued in equity by a creditor of his ancestor or testator, it would follow that three actions or suits might be necessary to accomplish what can be accomplished without difficulty by one suit in equity; for the creditor might first sue the heir or devisee at law, and having thus obtained payment of his debt in part, he might then sue the executor at law or in equity for the remainder; and, lastly, the heir or devisee might, on the principle of subrogation, sue the executor in equity, and recover back what he had been compelled to pay; clearly, therefore, whenever a creditor who sues an executor in equity, is entitled also to call upon the heir or devisee for payment of his debt, he may make the latter a co-defendant to his suit, on the principle of preventing a multiplicity of suits.

C. C. Langdell.

[*To be continued.*]

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[1] Quarles *v.* Capell, Dyer, 204 *b*, pl. 2; Davy *v.* Pepys, Plow. 438 *a*, 439 *a*; Davies *v.* Churchman, 3 Lev. 189.

[2] Seton, Decrees (1st ed.), 82, *et seqq.*